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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON 1400 Eye Street, N.W., Suite 450 Washington, D.C. 20005 Plaintiff, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES 200 Independent Avenue, S.W. Washington, D.C. 20201 Defendant.	:	Civil Action No.

COMPLAINT FOR
DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, as amended, as well as agency FOIA regulations, challenging the failure of the Department of Health and Human Services (HHS) to fulfill the request of Plaintiff for documents relating to federally funded pregnancy resource centers.

2. This case seeks declaratory relief that Defendant is in violation of the FOIA and HHS regulations 45 C.F.R. Part 5, for failing to fulfill Plaintiff's request for records, for failing to grant Plaintiff's request for a waiver of fees, and injunctive relief that Defendant immediately and fully comply with Plaintiff's request under the FOIA.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. §1331. Venue lies in this district under 5 U.S.C. §552(a)(4)(B).

4. Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. CREW is dedicated to empowering citizens to have an influential voice in government decisions and in the government decision-making process. To advance its mission, CREW uses a combination of research, litigation, advocacy and public education. As part of its research CREW uses government records made available to it under the FOIA.

5. CREW has invested considerable organizational resources in pushing the U.S. government to take ethical issues seriously. CREW monitors closely the laws and rules applicable to government agencies.

6. CREW is harmed by HHS's failure to comply with the FOIA, because that failure harms CREW's ability to provide full, accurate, and current information to the public on a matter

of great public interest and urgency. 5 U.S.C. §552(a)(6)(c). Absent this critical information, CREW cannot advance its mission of educating the public to ensure that the public continues to have a vital voice in government decisions.

7. CREW will analyze the information it receives that is responsive to its request, and will share it with the public through memoranda, reports, or press releases. In addition, CREW will disseminate any documents it acquires from its request to the public through its website, www.citizensforethics.org. Currently, the CREW website contains links to thousands of pages of documents acquired from multiple FOIA requests. See http://citizensforethics.org/activities/foia.php. Visitors to CREW's website can peruse the FOIA request letters, the responses from government agencies, and a growing number of documents responding to FOIA requests. CREW's virtual reading room provides around-the-clock access to anyone willing to learn about the government activities that have been the focus of CREW's FOIA requests. The CREW website also includes documents relating to CREW's FOIA litigation, Internal Revenue Service complaints, and Federal Election Commission complaints.

8. Defendant HHS is an agency within the meaning of 5 U.S.C. §552(f). Defendant is the federal agency with possession and control of the requested records and is responsible for fulfilling Plaintiff's FOIA request.

STATUTORY FRAMEWORK

The Freedom of Information Act

9. The FOIA, 5 U.S.C. §552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

10. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether or not to fulfill the request, and of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. §552(a)(6)(A)(i).

11. An agency must respond to a FOIA appeal within 20 working days, notifying the appealing party of the agency's determination to either release the withheld records or uphold the denial. 5 U.S.C. §552(a)(6)(A)(ii).

12. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal, but must provide notice and must also provide "the date on which a determination is expected to be dispatched." 5 U.S.C. §552(a)(6)(B).

13. This Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. §552(a)(4)(B).

14. The FOIA provides a mechanism for disciplinary action against agency officials who have acted inappropriately in withholding records. Specifically, when requiring the release of improperly withheld records, if the Court makes a written finding that "the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously," a disciplinary investigation is triggered. 5 U.S.C. §552(a)(4)(F).

15. The FOIA also requires each agency to promulgate regulations specifying a fee schedule for the processing of FOIA requests and establishing procedures and guidelines for the waiver or reduction of fees. 5 U.S.C. §552(a)(4)(A). Defendant HHS's fee waiver regulations are found at 45 CFR § 5.45. Both the FOIA and HHS regulations provide that documents should

be produced at no charge to the requester or at a reduced charge if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. §552(a)(4)(A)(iii); 45 CFR § 5.45.

FACTS GIVING RISE TO PLAINTIFF'S CLAIMS FOR RELIEF

16. In July 2006, Representative Henry A. Waxman released a report based on his request of the U.S. House of Representatives' Special Investigations Division to conduct an investigation into whether the information provided by federally funded pregnancy resource centers to pregnant women and teens is scientifically accurate. See United States House of Representatives, Committee on Government Reform - Minority Staff, Special Investigations Division, "False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers" (July 2006) (online at: http://reform.democrats.house.gov/Documents/20060717101140-30092.pdf) (attached as Exhibit A).

17. According to the report, pregnancy resource centers were created in 2002, and are a component of the Bush Administration's faith-based initiative program. Id at 2.

18. In exchange for their receipt of more than $30 million in federal funding, pregnancy resource centers provide counseling to pregnant teenagers and women. Additionally, 25 pregnancy resource centers in 15 states receive additional funding through grants from a new $150 million "capacity-building" Compassion Capital Fund which is managed by HHS. Id at 3-4.

19. For purposes of this report, female investigators focused on the 25 pregnancy resource centers that have received grants from the Compassion Capital Fund. Posing as pregnant 17-year-

olds trying to have an abortion, the investigators successfully telephoned 23 of the 25 centers and requested information and advice regarding unintended pregnancy. Id at i.

20. Out of the 23 pregnancy resource centers that were successfully contacted, 20 of them provided false or misleading information about the health effects of abortion. Some of them also misrepresented the medical risks of abortion by informing callers that abortion could increase the risks of breast cancer, sterility, and suicide. Id.

21. Finally, the report found that the false information provided by the pregnancy resource centers "may advance the mission of the pregnancy resource centers, which are typically pro-life organizations dedicated to preventing abortion, but it is an inappropriate public health practice." Id at ii.

22. On July 18, 2006, *The Washington Post* reported that a spokeswoman for one of the two large networks of pregnancy resource centers, Care Net's Molly Ford, had stated that despite mainstream medical opinion, she agrees with the pregnancy resource center counselors who tell women that abortion may increase the risk of breast cancer, infertility and post-abortion syndrome. Mark Kaufman, Pregnancy Centers Found to Give False Information on Abortion, *The Washington Post*, July 18, 2006 (attached as Exhibit B).

23. Additionally, the article stated that prior to 2001, few of the pregnancy resource centers had received any federal funding, but since President Bush has been an advocate for pregnancy resource centers and abstinence-only sex education, there are now about 2000 centers in the United States and Canada that receive federal funding. Id.

24. HHS continues to manage and provide the Compassion Capital Fund grants to pregnancy resource centers despite the centers' continued campaign of misinformation to the public. Id.

Plaintiff's FOIA Request and Follow-Up

25. By letter dated August 4, 2006, pursuant to the Freedom of Information Act, Plaintiff requested that HHS produce all records that mention or relate to the following: federally funded pregnancy resource centers; communications with the White House or any federal, state or local government agencies regarding pregnancy resource centers; faith based and community initiatives as they relate to pregnancy resource centers; and the federal funding of pregnancy resource centers. See Letter from Sharon Y. Eubanks to HHS Freedom of Information Officer, Dept. Of Health and Human Services, August 4, 2006 (attached as Exhibit C).

26. CREW also requested a waiver of fees associated with processing its request, pursuant to 5 U.S.C. §552(a)(4)(A)(iii). Id. CREW explained that the subject of its request concerns "the operations of the federal government," "the disclosures will likely contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way," and CREW is making the request "primarily and fundamentally for non-commercial purposes." Id. More specifically, CREW explained that the records it was seeking "are likely to contribute to the public's understanding of the how the government uses taxpayer dollars in its grant-awarding process." Id.

27. By postcards dated August 21, 2006 and September 5, 2006, HHS Office of the Secretary and HHS Administration for Children and Families, respectively, advised CREW that

each office had received CREW's Freedom of Information Act request for records regarding federally funded pregnancy resource centers (attached as Exhibit D-E).

28. By letter dated August 23, 2006, HHS' Public Health Service Freedom of Information Office also advised CREW that it had received CREW's Freedom of Information Act request. See Letter from HHS Public Health Service FOIA Office to Sharon Y. Eubanks, August 23, 2006 (attached as Exhibit F). HHS further advised CREW that pursuant to Departmental Regulations, 45 CFR Part 5, Subpart D, it had classified CREW as a Category III Requester and, as such, CREW would be charged for duplication, editing, search time and review of all pages of duplication over 100 pages, and for any search time after the first two hours. Id.

29. By letter dated September 13, 2006, CREW appealed the classification of CREW as a Category III Requester by the HHS Public Health Service Freedom of Information Office, demonstrating that CREW was entitled to a complete waiver of fees pursuant to HHS's two-part criteria. See Letter from Kimberly D. Perkins to Darlene Christian, September 13, 2006 (attached as Exhibit G).

30. With the exception of the aforementioned postcards of August 21 and September 5, 2006, and letter of August 23, 2006, CREW has received no other response from HHS regarding CREW's August 4, 2006 FOIA request, or its appeal of September 13, 2006.

31. CREW has now exhausted its administrative remedies with respect to the processing of CREW's FOIA request. See, e.g., Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 65 (D.C. Cir. 1990).

PLAINTIFF'S CLAIMS FOR RELIEF

CLAIM ONE
(Failure to Produce Records)

32. Plaintiff realleges and incorporates by reference all preceding paragraphs.

33. Plaintiff properly asked for records within HHS's control.

34. Plaintiff is entitled by law to access to the records requested under the FOIA, unless Defendant makes an explicit and justified statutory exemption claim.

35. Therefore Defendant violated FOIA's mandate to release agency records to the public by failing to release the records as Plaintiff specifically requested. 5 U.S.C. §§552(a)(3)(A), 552(a)(4)(B).

CLAIM TWO
(Improper Denial of Fee Waiver)

36. Plaintiff realleges and incorporates by reference all preceding paragraphs.

37. Plaintiff has demonstrated that it is entitled to a waiver of fees associated with processing its FOIA request, because disclosure of responsive records will likely contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the plaintiff.

38. Therefore, Defendant violated FOIA's mandate to grant CREW a fee waiver and Defendant's own regulations in its initial determination that CREW is not entitled to a waiver of fees. 5 U.S.C. §552(a)(4)(A)(iii); 45 CFR § 5.45.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

(1) Declare that HHS has violated the Freedom of Information Act by failing to lawfully satisfy Plaintiff's FOIA request of August 4, 2006;

(2) Declare that HHS violated the Freedom of Information Act and agency regulations when it determined that Plaintiff is not entitled to a waiver of all fees associated with the processing of its FOIA request and Declare that Plaintiff is entitled to a fee waiver

(3) Order HHS to grant Plaintiff's fee waiver request and process immediately Plaintiff's FOIA request;

(4) Award Plaintiff its reasonable attorney fees and litigation costs in this action, pursuant to 5 U.S.C. §552(a)(4)(E); and

(5) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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